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EIGHTH COURT OF APPEALS
EL PASO, TEXAS
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**NO. 08-18-00180-CR**

**IN THE COURT OF APPEALS**
**EIGHTH DISTRICT OF TEXAS**

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EL PASO, TEXAS
10/17/2019 10:53:03 AM
ELIZABETH G. FLORES
Clerk

**MARIO ERNESTO MARTELL** **APPELLANT**

**V.**

**THE STATE OF TEXAS** **APPELLEE**

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# THE STATE'S BRIEF

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**ON APPEAL FROM CAUSE NUMBER 990D03958**
**IN CRIMINAL DISTRICT COURT NO. 1 OF EL PASO COUNTY, TEXAS**

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**The State requests oral argument.**

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

### FEDERAL CASES



### STATE CASES



### STATE STATUTES

## STATEMENT OF THE CASE

Appellant, Mario Ernesto Martell, was indicted for the third-degree-felony offense of possession of marijuana in an amount of 50 pounds or less but more than 5 pounds. (CR at 7).[1] On October 6, 1999, Martell entered a negotiated plea of guilty, and pursuant to the plea agreement, the trial court deferred adjudication and placed Martell on community supervision for a period of 4 years. (Supp. CR at 5-12 – the docket sheet and plea papers); (CR at 19-24).

On March 4, 2002, within the original period of community supervision, the State filed a motion to adjudicate Martell's guilt. (CR at 28-35). After a contested adjudication hearing conducted over three days on January 26, 2018, May 31, 2018, and September 12, 2018, the trial court adjudicated Martell guilty of the possession-of-marijuana charge and placed him on "straight" probation for 10 years. (RR5 at 8-11); (CR at 73-74). Martell timely filed notice of appeal from this adjudication. (CR at 79, 94).

[1] Throughout this brief, references to the record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the supplemental clerk's record will be made as "Supp. CR" and page number, and references to the reporter's record will be made as "RR" and volume and page number.

## STATEMENT OF FACTS

***Martell's community supervision***

When Martell was initially placed on deferred-adjudication community supervision on October 6, 1999, the trial court expressly permitted him to reside in Juarez, Mexico, during the period of his supervision. (CR at 22-24 – term and condition h.(2) of Martell's community supervision). However, he was still required to report to his probation officer here in El Paso once a month. (CR at 22-24 – term and condition d.(1) of Martell's community supervision). Martell's residence address was listed on the terms and conditions of his community supervision as "Juan Escutia #1257," which was an address in Juarez. (CR at 24).

After only a couple of months, Martell stopped reporting to his probation officer as required, and the violation notices submitted by the probation department in 2000, as well as the bench warrant ultimately issued in 2000 for Martell's arrest, listed his residence address as that same address in Juarez. (CR at 26-27, 36-39). Ultimately, on March 4, 2002, the State filed its motion to adjudicate Martell's guilt, alleging–among other things–that Martell had failed to report to his probation officer as required during the months of December of 1999 through December of 2001. (CR at 28-35). A capias for Martell's arrest to answer to the motion to adjudicate was issued that same date (March 4, 2002), but Martell

was not thereafter arrested until August 11, 2017. (CR at 53-54). At the time of his arrest on August 11, 2017, Martell resided in El Paso. (CR at 40-50 – Martell's motion for appointment of counsel, and the corresponding orders appointing counsel, listing Martell's address as 3301 Chicksaw Drive in El Paso).

***The adjudication proceedings***

**Bond hearing – September 20, 2017**

At a bond hearing on September 20, 2017, following Martell's August 11, 2017, arrest on the capias, the trial court, noting that Martell was placed on 4-years' community supervision back in 1999, asked the parties what was going on. (RR2 at 4). The prosecutor responded that Martell had absconded. (RR2 at 4). But defense counsel argued that Martell had not absconded; rather, the probation department knew Martell was living in Mexico at the time he was placed on probation. (RR2 at 5). Counsel further explained that Martell, who was a United States citizen, had returned to the United States in 2010 because of the violence in Mexico, had been openly living and working in El Paso since 2010, and was not aware of any outstanding warrants for his arrest during that time. (RR2 at 5-7).

A probation officer present at the hearing then stated that Martell was placed on the probation department's "unable to locate caseload" at the time he stopped reporting back in 1999. (RR2 at 7). When the court noted that Martell

apparently had permission to reside in Mexico when he was placed on probation, the officer responded that the probation department had sent a letter to Martell's listed address in Mexico directing him to report. (RR2 at 7-8).[2] The trial court then set a $1,000 P.R. bond. (RR2 at 8).

**Contested revocation/adjudication hearing – January 26, 2018**

At the contested revocation/adjudication hearing on January 26, 2018, Adrian Aguirre, a court-liaison officer with the probation department, testified that Martell was placed on probation on October 6, 1999, and that after he stopped reporting, he was considered to be an absconder. (RR3 at 6-7). Aguirre testified that Martell's file indicated that after Martell failed to report in December of 1999, the department "did their follow-up" and sent a letter to his (Martell's) address in Juarez, and when Martell again failed to report in January 2000, the department sent a second letter to his (Martell's) Juarez address. (RR3 at 8-9). And after sending this second letter, the department also tried to contact Martell by telephone on February 15, 2000, calling the number Martell had provided, but this

[2] The record further shows that Martell's original probation officer noted in his violation report (dated March 16, 2000) that after Martell stopped reporting as required, he (the probation officer) "attempted to re-establish communication with [Martell], but all attempts were fruitless." (CR at 37).

attempt was unsuccessful. (RR3 at 9-13).[3] After these unsuccessful attempts to locate Martell, the probation department obtained, on October 9, 2000, a bench warrant for Martell's arrest for failing to report, and they further began submitting violation notices to the District Attorney's Office so that the State could file a motion to revoke Martell's probation. (RR3 at 13).

Aguirre also testified that Martell's file indicated that during this time period (specifically, on May 19, 2000), Martell's probation officer checked their computer system and discovered that Martell was also supposed to be in a pretrial-diversion program for an unrelated DWI offense, and after speaking to the caseworker for that program, the probation officer learned that he (Martell) had never reported to that program. (RR3 at 14). The prosecutor concluded her direct examination of Aguirre by establishing that after Martell was placed on 4-years' probation on October 6, 1999, he only reported to his probation officer as required three times, the last time being in November of 1999. (RR3 at 16-17).

On cross-examination by defense counsel, Aguirre agreed that nothing in Martell's file indicated that any attempts were made by any agency or law-enforcement officer to locate or contact Martell at his place of residence or

[3] Aguirre testified that Martell's file indicated that this call was answered by someone named "Maribel," who claimed to be a "friend of the family." (RR3 at 13).

employment in Mexico after the State filed its motion to adjudicate and the capias was issued on March 4, 2002. (RR3 at 18-21). Aguirre further agreed that the probation department's policy prohibited a probation officer from contacting a probationer after a capias had issued. (RR3 at 21). Finally, Aguirre agreed that Martell's 4-year probation term would have expired in 2007. (RR3 at 21).

Upon further questioning by the trial court, Aguirre testified that Martell's file indicated that he both resided and worked in Juarez, and he (Aguirre) agreed with the court that Martell's probation officer "would not be able to go to Juarez to do any home visits or anything like that." (RR3 at 21-22).

In her opening argument to the court, the prosecutor recognized the due-diligence affirmative defense codified in the Texas Code of Criminal Procedure. (RR3 at 23).[4] The prosecutor argued, however, that because Martell resided and worked in Mexico, neither the probation department nor any other local law-enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address in Mexico. (RR3 at 23-25). She further argued that the record showed that the

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[4] *See* TEX. CODE CRIM. PROC. art. 42A.109 (providing that it is an affirmative defense to revocation/adjudication based on a failure to report that no supervision officer, peace officer, or other officer with the power to arrest under a warrant issued for that alleged violation contacted or attempted to contact the defendant in person at the defendant's last known residence address or employment address, as reflected in the files of the local probation department).

authorities did attempt to make contact with Martell after he stopped reporting by sending letters to his listed address and calling his listed telephone number. (RR3 at 24). Finally, she argued that because Martell never notified his probation officer that he had returned to live in the United States in 2010, the probation department had no way of knowing that he had actually been here in El Paso since 2010. (RR3 at 25).

Defense counsel countered that all the State had to do to demonstrate the required due diligence was to attempt to make contact at a last-known address at some point after the arrest warrant or capias was issued. (RR3 at 26-28).[5] Counsel further argued that the evidence showed that no attempt was made by anyone to contact Martell after the capias issued and that it was, in fact, against the probation department's policy to attempt to contact the defendant after a capias had issued. (RR3 at 26-28).

The prosecutor responded to Martell's argument on two fronts. First, she argued that the due-diligence affirmative defense placed the burden on Martell to demonstrate that no law-enforcement officer attempted to make contact with him,

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[5] *See also* (RR3 at 36-37 – where defense counsel specifically argued that the due-diligence requirement of article 42A.109 could only be satisfied if the probation department [or some other law-enforcement agency] attempted to make contact with the defendant *after the capias had issued*, and that any pre-capias attempts to make contact were not sufficient to establish the required due diligence).

and that because Aguirre was not a representative of the sheriff's office, his testimony that he was not aware of any attempts by the sheriff's office to contact Martell did not constitute sufficient, affirmative evidence that the sheriff's office did not, in fact, attempt to contact Martell. (RR3 at 28-29). Second, the prosecutor argued that because Martell was residing and working in Mexico, he should not get the benefit of remaining in that foreign country, beyond the reach and jurisdiction of the local probation and law-enforcement authorities. (RR3 at 29-30).

Defense counsel responded that Martell had met his burden of proving the due-diligence affirmative defense, in that Aguirre's testimony that Martell's probation file did not reflect any attempts by any law-enforcement agency to contact him after the capias had issued was sufficient to satisfy all of the statutory requirements of that affirmative defense. (RR3 at 30-32).

In taking the due-diligence issue under advisement, the trial court noted that this case was different, in that no officer could go into Mexico to contact Martell or execute the warrant or capias, such that it was legally impossible to try to make personal contact with Martell in Mexico. (RR3 at 34-35). The court also indicated that it did not read article 42A.109 to necessarily require a *post-capias* attempt to contact the defendant, and the court invited defense counsel to provide

caselaw supporting Martell's contrary interpretation of the statute. (RR3 at 36-38).

**Status hearing – May 31, 2018**

The trial court reconvened the case on May 31, 2018, indicated that it had considered the parties' arguments and reviewed the caselaw on the due-diligence issue, and rejected Martell's defense and found the failure-to-report allegations in the motion to adjudicate to be true:

> [The Court]: ...We had had a contested revo and there had been evidence, I guess, presented. And then what had happened is that both sides submitted – I guess the whole issue was on whether Mr. Martell had received – there had been efforts from the probation department to reassert supervision and whether he had been contacted.
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> * * *
>
> [The Court]: All right. And then so I was provided with case law. I don't think – I don't think I signed an order. So I want to make sure that I put it on the record that I did consider the arguments on the due diligence. And that in chambers, I did tell both sides that the fact that Mr. Martell had been given permission to reside in Mexico, that I didn't feel that it was in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.
>
> So at that point, I asked that this hearing be set so that then I could – we can determine, I guess, how we were going to move forward with the case.
>
> So I did find that the allegations in the motion to adjudicate guilt were true, that he didn't report during that – this period of time in violation of his probation. So now, we need to go forward on, I guess, what we do after this.

(RR4 at 5).

Thereafter, the court heard evidence and arguments on the issue of sentencing and took the sentencing issue under advisement. (RR4 at 6-35).

**Sentencing – September 12, 2018**

Some 3½ months later, the trial court formally adjudicated Martell's guilt, sentenced him to 10-years' confinement, and probated the sentence and placed him on 10-years' "straight" probation. (RR5 at 8-11); (CR at 73-74).

## SUMMARY OF THE STATE'S ARGUMENTS

The trial court expressly stated on the record that it had considered the due-diligence issue. And when properly read in context, the court's comments demonstrate that the court did not, as Martell asserts, refuse to consider the due-diligence issue outright. Rather, the court merely concluded that Martell's residency and employment in Mexico made it factually and legally impossible for any local officer to contact him in person, due to jurisdictional barriers, such that Martell had failed in his burden of proving that the probation department's other attempts at contacting him at his listed and last-known address did not constitute the requisite due diligence. Martell's first issue presented for review should thus be overruled.

As for Martell's second issue, neither the statute establishing the due-diligence affirmative defense nor the Court of Criminal Appeals' interpretations of the defense require, as a prerequisite to establishing due diligence, post-capias attempts at contacting the defendant by the probation department or other law-enforcement officers. And because neither the probation department nor any other local law-enforcement officer had the jurisdictional authority to cross the international border in an attempt to make in-person contact with Martell at his listed and last-known address in Mexico, any such attempt at in-person contact

would have been legally and factually impossible, and therefore futile. Therefore, because the law does not require the doing or attempting of a futile act, any failure by the probation department or other law-enforcement officers to make in-person contact with Martell in Mexico does not conclusively demonstrate a lack of due diligence, as the record shows that the department otherwise attempted to contact Martell at his listed and last-known address in Mexico by sending him letters directing him to report and by calling the telephone number provided by Martell. Martell thus failed in his burden of proving a lack of due diligence, and his second issue presented for review should be overruled as well.

## STATE'S REPLIES TO APPELLANT'S ISSUES PRESENTED

**REPLY TO ISSUES ONE AND TWO: The trial court did not erroneously refuse to consider the availability of the due-diligence affirmative defense; rather, the record shows that the court expressly stated that it had considered the due-diligence issue, and the court merely determined and ruled that Martell had not met his burden of proving the affirmative defense. Moreover, Martell has failed in his burden of showing that the evidence was legally or factually insufficient to support the trial court's rejection of the affirmative defense.**

## UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

## ARGUMENT AND AUTHORITIES

In this appeal, Martell raises two complaints regarding the trial court's decision to adjudicate his guilt and revoke his deferred-adjudication probation. In his first issue, Martell asserts that the trial court erred in determining that he (Martell) was not entitled to the affirmative defense of due diligence because he resided in Mexico and therefore refused to consider his due-diligence affirmative defense. *See* (appellant's brief at 8-10, 19). And in his second issue, Martell asserts that the trial court erred in concluding that he (Martell) failed to prove the due-diligence affirmative defense by a preponderance of the evidence. *See* (appellant's brief at 10-20). Because these complaints involve related factual and

legal issues, the State will reply to both issues in a single reply.

## I. The due-diligence affirmative defense

In 2003, the Texas Legislature added sections 21(e) and 24 to article 42.12 of the Texas Code of Criminal Procedure (the then-existing community-supervision statutes), thereby codifying a due-diligence affirmative defense to the trial court's continuing jurisdiction to revoke community supervision after the period of supervision has expired in certain circumstances. *See Garcia v. State*, 387 S.W.3d 20, 23 (Tex.Crim.App. 2012)(explaining the codification of the due-diligence affirmative defense in then-existing article 42.12 of the Texas Code of Criminal Procedure). And in 2017, this statutory due-diligence affirmative defense was recodified, without substantive change, into the new community-supervision statutes relocated in Chapter 42A of the Texas Code of Criminal Procedure. *See Enriquez v. State*, No. 08-15-00324-CR, 2018 WL 2328225, at *2 n. 1 (Tex.App.–El Paso, May 23, 2018, no pet.)(not designated for publication)(explaining this recodification and relocation of the community-supervision statutes, including the statutory due-diligence affirmative defense).

Relevant to this case, article 42A.109 provides for a due-diligence affirmative defense to the revocation of deferred-adjudication community supervision after the period of supervision has expired in certain circumstances:

> For the purpose of a hearing under Article 42A.108, it is an affirmative defense to revocation for an alleged violation based on a failure to report to a supervision officer as directed or to remain within a specified place that no supervision officer, peace officer, or other officer with the power of arrest under a warrant issued by a judge for that alleged violation contacted or attempted to contact the defendant in person at the defendant's last known residence address or last known employment address, as reflected in the files of the department serving the county in which the order of deferred adjudication community supervision was entered.

TEX. CODE CRIM. PROC. art. 42A.109.[6] As the Court of Criminal Appeals explained, since due diligence is an affirmative defense, the burden of proving the application of the defense, that is, proving the State's lack of due diligence, is on the defendant. *See Garcia v. State*, 387 S.W.3d at 23. And the State's due-diligence duty in this regard is limited to contacting or attempting to contact the defendant at his last-known residential or employment address. *See id.*[7]

## II. Standards of review

A trial court's decision to proceed to an adjudication of guilt and revoke deferred-adjudication community supervision should be reviewed under the same

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[6] In his brief, Martell cites and relies on article 42A.756 in support of his due-diligence argument. *See* (appellant's brief at 9, 14). However, article 42A.756 applies only to revocations of "straight" probation, *see* TEX. CODE CRIM. PROC. art. 42A.756, and article 42A.109–the provision cited by the parties in the trial court–applies to revocations of deferred-adjudication probation. The substance and application of the two provisions are the same.

[7] There is no dispute that Martell's community supervision was revoked based on a failure to report to his probation officer, such that the due-diligence affirmative defense is available in this case. *See Garcia v. State*, 387 S.W.3d at 23-24.

standard as a revocation of "straight" probation. *See Pena v. State*, 508 S.W.3d 599, 604 (Tex.App.–El Paso 2016, pet. ref'd). In such a revocation proceeding, the State must prove a violation of a condition of community supervision by a preponderance of the evidence. *See id.* Generally, the trial court's decision to revoke should be reviewed for an abuse of discretion in light of the State's burden of proving the violation. *See id.* And if the State fails to meet its burden of proving a violation, then the trial court abuses its discretion by revoking community supervision. *See id.* An abuse of discretion may also be shown if the trial court revokes community supervision for an inappropriate reason. *See id.* (and cases cited therein). This general abuse-of-discretion standard is the appropriate standard for reviewing Martell's first issue presented for review.

Because Martell's second issue presented for review attacks the sufficiency of the evidence supporting the trial court's rejection of his due-diligence affirmative defense, an issue on which Martell bore the burden of proof in the trial court, the general standard of review described above must necessarily be modified somewhat. In reviewing the legal sufficiency of the evidence on this issue, this Court should view the evidence in the light most favorable to the trial court's rejection of the defense and reverse the trial court's ruling only if the evidence conclusively establishes the affirmative defense. *See Wheat v. State*, 165

S.W.3d 802, 806-07 & n. 6 (Tex.App.–Texarkana 2005, pet. dism'd, untimely filed)(explaining the proper standard for reviewing the trial court's rejection of the due-diligence affirmative defense). And in reviewing the factual sufficiency of the evidence on this issue, this Court should view all of the evidence in a neutral light and determine whether the trial court's ruling is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See id.*; *see also Matlock v. State*, 392 S.W.3d 662, 669-74 (Tex.Crim.App. 2013)(holding that both the legal- and factual-sufficiency standards apply to a review of a factfinder's rejection of an affirmative defense). As such, Martell may show an abuse of discretion in this regard only if the evidence was legally or factually insufficient to support the trial court's rejection of his due-diligence affirmative defense.

## III. Martell has failed to show that the trial court abused its discretion in ruling on the availability and/or applicability of the due-diligence affirmative defense in this case. (Issue One).

The record in this case shows, as discussed in the statement of facts above, that there was no real dispute–as so found by the trial court–that Martell failed to report to his probation officer as required between the months of December of 1999 and December of 2001, as alleged in the State's motion to adjudicate. And the only contested issue regarding the trial court's decision to revoke/adjudicate was the State's diligence in attempting to contact Martell, that is, whether Martell

had satisfied his burden of demonstrating the State's lack of due diligence in contacting him and bringing him before the court for revocation proceedings prior to the expiration of the supervision period.

In his first issue, Martell asserts that the trial court erred by ruling that the statutory due-diligence affirmative defense was not available to him (Martell) because he was permitted to live and work in Mexico. But when properly viewed in context, the trial court's comments demonstrate that the court instead ruled only that Martell's residence and employment in Mexico factored into the court's decision that Martell had failed in his burden of establishing a lack of due diligence by the State in contacting him and bringing him before the court for revocation proceedings, as it was legally and factually impossible for any State authorities to go to Mexico to attempt personal contact with him.

As discussed above, the prosecutor argued–on the due-diligence issue–that Martell's probation officer had attempted to contact Martell by sending letters to his listed address in Mexico and by calling the telephone number (in Mexico) provided by Martell; however, neither the probation department nor any other local law-enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address in Mexico. (RR3 at 23-25, 29-30). And when the trial court initially took

the issue under advisement, the court agreed that this case was unusual, in that no officer had jurisdiction or authority to go into Mexico to contact Martell or execute the warrant or capias, such that it was legally impossible to try to make personal contact with Martell in Mexico. (RR3 at 34-35).

Ultimately, in rejecting Martell's due-diligence affirmative defense, the trial court expressly noted that it had considered Martell's arguments on the defense, but had nevertheless concluded that the jurisdictional barrier to making personal contact with Martell in Mexico was fatal to Martell's claim that the State failed to exercise due diligence in attempting to contact him:

> [The Court]: …We had had a contested revo and there had been evidence, I guess, presented. And then what had happened is that both sides submitted – I guess the whole issue was on whether Mr. Martell had received – there had been efforts from the probation department to reassert supervision and whether he had been contacted.
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> [The Court]: All right. And then so I was provided with case law. I don't think – I don't think I signed an order. **So I want to make sure that I put it on the record that I did consider the arguments on the due diligence.** And that in chambers, I did tell both sides that the fact that Mr. Martell had been given permission to reside in Mexico, that I didn't feel that it was in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.
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> So at that point, I asked that this hearing be set so that then I could – we can determine, I guess, how we were going to move forward with the case.
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> So I did find that the allegations in the motion to adjudicate guilt were true, that he didn't report during that – this period of time in violation of his

> probation. So now, we need to go forward on, I guess, what we do after this.

(RR4 at 5)(emphasis added). Simply, the record shows that the trial court did not, as Martell asserts, outright refuse to consider the due-diligence issue because Martell was permitted to reside and work in Mexico; rather, the totality of the court's statements indicate that the court merely considered Martell's residency and employment in Mexico–as well as the legal and factual impossibility of in-person contact with him in Mexico–as a factor in the due-diligence determination and determined that, under these particular circumstances, Martell had failed in his burden of proving a lack of due diligence by the State. *Cf. Hill v. State*, 90 S.W.3d 308, 316 (Tex.Crim.App. 2002)(noting the well-settled principle that, "The law does not require a futile act."); *cf. also Ohio v. Roberts*, 448 U.S. 56, 74-77 (1980)(in addressing the prosecution's duty to make a good-faith effort to obtain the presence of a witness at trial for purposes of a Confrontation Clause analysis, holding that the law does not require the doing of a futile act, and the lengths to which the prosecution must go to produce a witness is a question of reasonableness), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). In other words, the totality of the trial court's comments demonstrates that it rejected Martell's due-diligence affirmative defense, in part,

because it was legally and factually impossible for the State to have attempted in-person contact with Martell in Mexico, such that Martell had failed in his burden of proving that the State's other efforts at contacting him were not sufficient to constitute the requisite level of diligence.

For these reasons, Martell has failed to show that the trial court abused its discretion by revoking his deferred-adjudication community supervision for an inappropriate reason (namely, the asserted outright failure to consider the due-diligence affirmative defense). Martell's first issue presented for review should thus be overruled.[8]

## IV. Martell has failed in his burden of demonstrating that the evidence was legally or factually insufficient to support the trial court's rejection of his due-diligence affirmative defense. (Issue Two).

Martell's legal- and factual-sufficiency challenges to the trial court's rejection of his due-diligence affirmative defense are twofold: (1) the evidence showed that no efforts were made by the probation department or any other officer to contact him after the revocation/adjudication capias had issued; and (2) the

[8] Even if this Court agrees with Martell's assertion that the trial court's comments show that the trial court determined that the due-diligence affirmative defense was not even available to Martell in this case, Martell has nevertheless failed to show that the trial court abused its discretion by revoking his community supervision and adjudicating his guilt, in that–as will be discussed in the State's reply to Martell's second issue–Martell has failed in his burden of showing that the evidence was legally or factually insufficient to support a rejection of the affirmative defense.

evidence showed that no efforts were made by any officer to contact him in person, either before or after the capias had issued.

**A. Post-capias attempts to contact are not absolutely required.**

As for Martell's assertion that the State's duty of due diligence requires post-capias attempts to contact the defendant, such assertion is contrary to the Court of Criminal Appeals' interpretation of the due-diligence defense. First in that regard, no such post-capias-attempt-at-contact requirement is contained in article 42A.109. Rather, as the Court of Criminal Appeals expressly held, the State's due-diligence duty is limited "to contacting or attempting to contact the defendant at his last-known residential or employment addresses." *See Garcia v. State*, 387 S.W.3d at 23. Thus, neither the statute itself, nor the Court of Criminal Appeals' most-recent interpretation of this aspect of the statute, requires post-capias attempts to contact the defendant.

Further, Martell's reliance on two pre-2003 cases interpreting the previous common-law due-diligence defense in support of his assertion that post-capias attempts at contact are required, *see* (appellant's brief at 14-19)(citing *Harris v. State*, 843 S.W.2d 34 (Tex.Crim.App. 1992), and *Bawcom v. State*, 78 S.W.3d 360 (Tex.Crim.App. 2002)), is misplaced. In *Harris*, the Court held that the common-law due-diligence defense required the State to show that it exercised diligence in

its investigative efforts to apprehend the defendant after the motion to revoke was filed and the capias issued. *See Harris v. State*, 843 S.W.2d at 36, *overruled by Bawcom v. State*, 78 S.W.3d 360 (Tex.Crim.App. 2002). But the Court, in *Bawcom v. State*, expressly overruled *Harris* on this precise issue, expressly holding that pre-capias efforts to contact the defendant can be considered in the due-diligence analysis and may alone be sufficient to establish the requisite diligence:

> *Harris's* bright-line rule excluding from consideration the authorities' pre-capias efforts to locate probationers is contrary to the purpose...of preventing absconding probationers from benefitting from their wrongful conduct. The timing of the State's efforts to locate the probationer–including whether those efforts occurred before or after the filing of a motion to revoke and the issuance of a capias–are simply factors that reflect on the diligence of the State's efforts.
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> * * *
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> As discussed above, excluding from the due diligence determination pre-capias efforts to locate a probationer would benefit those who choose to hide from the law. Such a rule also encourages authorities to repeat any pre-capias actions after the capias has issued, even if such a repeat of efforts would be futile–because the State would not want to forfeit the use of such actions in a later due diligence determination. We will not require authorities to repeat efforts to contact a probationer that have already been determined to be fruitless.
>
> * * *
>
> Insofar as *Harris* held that actions taken before a motion to revoke is filed or a capias is issued could not be considered as evidence of due diligence, it is overruled.

*Bawcom v. State*, 78 S.W.3d at 366-67.[9]

As such, even under the previous common-law due-diligence scheme, pre-capias efforts at contact could be considered in the due-diligence analysis and could, depending upon the circumstances, be sufficient to demonstrate the requisite level of diligence. And the Legislature, in enacting the current, statutory due-diligence affirmative defense, intended the statutory scheme to be less-burdensome on the State than the common-law scheme, *see Garcia v. State*, 387 S.W.3d at 23, and certainly did not re-insert any post-capias-attempt-at-contact requirement into the language of the due-diligence statute.

As such, to the extent Martell relies on evidence suggesting that no post-capias attempts to contact him were made in this case in support of his legal- and factual-sufficiency challenges to the trial court's rejection of his due-diligence affirmative defense, such reliance is misplaced, particularly where: (1) the evidence showed that the probation department's pre-capias attempts to contact

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[9] In his brief, Martell cites Judge Johnson's concurring opinion in *Bawcom*, in which she opined that pre-capias efforts to locate the defendant may be considered only in determining whether subsequent post-capias efforts constituted due diligence, as if it was the holding of the Court. *See* (appellant's brief at 15). But Judge Johnson's concurring opinion is not the holding of the Court, as a majority of the Court expressly held, as discussed above, that pre-capias efforts at contacting the defendant may be considered, in-and-of themselves, in the due-diligence determination, expressly overruling *Harris* in that regard. *See Bawcom v. State*, 78 S.W.3d at 366-67.

Martell at his last-known address and telephone number were fruitless, *see* *Bawcom v. State*, 78 S.W.3d at 366-67 (holding that due-diligence does not require the State to repeat pre-capias efforts at contact that were shown to be fruitless); and (2) there was no showing that any further attempts would not have been futile, given that no officer had the jurisdictional authority to attempt to make in-person contact with Martell in Mexico. This part of Martell's second issue presented for review should thus be overruled.

### B. Despite the lack of in-person-contact attempts (due to the jurisdictional impossibility of any such attempts), Martell has failed in his burden to show that the State did not exercise due diligence in attempting to contact him at his last-known address.

As for Martell's assertion that the lack of any in-person-contact attempts demonstrated a lack of due diligence, the record shows–as the trial court noted–that the probation department did what it had the jurisdiction to do to attempt to make contact with Martell at his last-known address. The State here recognizes that article 42A.109 requires an attempt to contact the defendant in person at his last-known address. *See* TEX. CODE CRIM. PROC. art. 42A.109. But as discussed above, the law does not require the doing of a futile act. *See Ohio v. Roberts*, 448 U.S. at 74; *Hill v. State*, 90 S.W.3d at 316. And under the particular circumstances of this case, any attempt to make in-person contact with Martell at

his last-known residence or work address, which were both in Juarez, Mexico, would have been absolutely futile, in that no probation officer or other local law-enforcement officer had any jurisdictional authority to go into Mexico to attempt such in-person contact. Simply, under the particular circumstances of this case, in-person contact with Martell at his last-known address in Mexico was a factual and legal impossibility.

Given the impossibility of in-person contact with Martell (unless such contact was initiated by Martell's presenting himself to his probation officer, which he had unlawfully refused to do when he stopped reporting as required by the terms and conditions of his community supervision), the record shows that the probation department did what it had the jurisdictional authority to do to contact Martell, namely, it sent letters to his listed address instructing him to report (to no avail) and called the telephone number provided by Martell looking for him (also to no avail, as Martell never returned the call).

As Martell conceded in the trial court, all that article 42A.109 requires is an attempt to contact the defendant at his last-known address; no further investigation efforts at locating the defendant are required. *See* (RR3 at 27); *see also Garcia v. State*, 387 S.W.3d at 23. And there was and is no dispute in this case that the probation department attempted, within the parameters of its jurisdictional

abilities, to contact Martell at his listed and last-known address in Mexico. As such, Martell failed in his burden to show that the State did not exercise due diligence in attempting to make contact with him at his last-known address, given the factual and legal impossibility (indeed, the absolute futility) of attempting in-person contact with Martell in Mexico. *See Ohio v. Roberts*, 448 U.S. at 74; *Hill v. State*, 90 S.W.3d at 316 (the law does not require the doing of a futile act).

In this case, Martell was given a huge benefit when, at the time he was initially placed on deferred-adjudication community supervision, the trial court granted him permission to live and work in Mexico as he requested, conditioned on his agreement to report to his probation officer here in El Paso on a monthly basis. And to now hold that the State failed to exercise due diligence in attempting to make in-person contact with him, after Martell breached his agreement to report and instead intentionally remained in Mexico beyond the jurisdictional reach of the probation department and other local law-enforcement agencies, would have the effect of judicially sanctioning such evasive efforts by other probationers similarly granted permission to reside and work in Mexico. As the trial court appropriately recognized, this would not serve the interest of justice.

For all of these reasons as well, this part of Martell's second issue presented for review should be overruled.

## PRAYER

WHEREFORE, the State prays that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 27, contains 6,126 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Tom A. Darnold
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## CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the above brief was sent by e-mail by utilizing the E-serve system on October 17, 2019, to appellant's attorneys: Octavio Arturo Dominguez, at odominguez@epcounty.com; and Maya I. Quevedo Stevenson, at mquevedo@epcounty.com.

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